

**July 20, 2006**

**DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY**

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**Appeal**

Name of Petitioner: Keep Yellowstone Nuclear Free

Date of Filing: March 21, 2006

Case Numbers: TFA-0156

This Decision concerns an Appeal that Keep Yellowstone Nuclear Free (KYNF) filed from a determination that was issued to it by the Department of Energy's (DOE) Idaho Operations Office (IOO). That determination responded to a request for information that KYNF filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. In that determination, IOO withheld certain documents in part or in whole. KYNF's Appeal, if granted, would require the release of the withheld information.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. 5 U.S.C. § 552(b)(1) - (9); *see also* 10 C.F.R. § 1004.10(b)(1) - (9).

**I. Background**

In its FOIA request, KYNF sought access to copies of documents related to the Draft Environmental Impact Statement for the Proposed Consolidation of Nuclear Operations Related to the Production of Radioisotopes Power Systems (Consolidation EIS) and the Final Programmatic Environmental Impact Statement for Accomplishing Expanded Civilian Nuclear Energy Research and Development Isotope Production Missions in the United States, Including the Role of the Fast Flux Test Facility (NIPEIS). This material pertains to the characteristics and operation of the Advanced Test Reactor (ATR), a nuclear reactor located within the boundaries of the Idaho National Engineering and Environmental Laboratory.

In its response, IOO identified 98 documents as being responsive to KYNF's request.<sup>1</sup> Of those 98 documents, one was completely withheld, one was determined to have been previously requested under the FOIA by KYNF's Executive Director<sup>2</sup>, seven were released in part, and the remaining 89 were released in full. IOO determined that the withheld material was shielded from mandatory disclosure under FOIA Exemptions 2 and 5. In its Appeal, KYNF challenges IOO's application of these Exemptions.

## II. Analysis

### A. Exemption 2

IOO withheld Document 1 and portions of Documents 3, 5, 8, 9, 65 and 66 under Exemption 2. That Exemption allows agencies to withhold records that are related solely to the internal personnel rules and practices of an agency. 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). The courts have interpreted the Exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (*Schiller*). The information at issue in the present case involves only the second category, "high two" information.

An agency seeking to withhold information under "high two" must be able to show that (1) the requested information is predominantly internal, and (2) its disclosure significantly risks circumvention of agency regulations or statutes. *Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981) (*en banc*) (*Crooker*). Information is considered to be "predominantly internal" if it "does not purport to regulate activities among members of the public . . . [and] does [not] . . . set standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public." *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*Cox*).

In its determination, IOO described the material withheld under Exemption 2 as "security sensitive information," and said that the "redactions were made on the basis that the information is integral to describing potential vulnerabilities of the reactor and related systems, and the methods and measures taken to prevent or mitigate those potential problems." IOO went on to state that release of the information "could enable malefactors to identify potential vulnerabilities and understand how

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<sup>1/</sup> An unspecified number of additional documents were located at the DOE Headquarters Office of Nuclear Energy, Science and Technology and at the DOE's Oak Ridge Operations Office. Portions of KYNF's request were referred to those Offices for direct response to the requester. This Appeals concerns only the 98 documents identified as responsive by IOO.

<sup>2/</sup> In response to this previous request, IOO determined that the document in question was generated by another DOE Office. IOO referred the request to that Office for direct response to KYNF.

to thwart the protective and mitigative measures in place.” January 31, 2006 Determination Letter at 3.

In its Appeal, KYNF argues that IOO’s application of Exemption 2 is not supported by the language of the Exemption or by judicial precedent. Specifically, the requester contends that the withheld material does not pertain to internal personnel rules and practices of the DOE, and that the courts have held this to be a threshold requirement for withholding information under Exemption 2. *Audubon Society v. United States Forest Service*, 104 F.3d 1201 (10<sup>th</sup> Cir. 1997); *Living Rivers v. United States Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003). Moreover, KYNF contends that the withheld material consists of engineering and safety information, and that because safety is a public concern, the material should not be considered “predominantly internal.” Finally, KYNF contests IOO’s finding that release of the information would aid malefactors in identifying the reactor’s vulnerabilities.

KYNF correctly points out that some federal courts have adopted a narrow construction of this Exemption. However, the District of Columbia Circuit Court of Appeals, our judicial overseer, has construed Exemption 2 more broadly, stating that the scope of the Exemption is not restricted “to minor employment matters.” *Crooker*, 670 F.2d at 1069. In that case, the Court upheld the withholding of a sensitive law enforcement training manual. In *Schiller*, the D.C. Circuit Court determined that litigation strategy pertaining to the Equal Access to Justice Act was properly withheld, stating that disclosure would render the information “operationally useless.” *Schiller*, 964 F. 2d. at 1208. This Court has also upheld the withholding under Exemption 2 of FBI symbol numbers that were used to identify confidential informants in *Lesar v. Department of Justice*, 636 F.2d 472 (D.C. Cir. 1980), even though the information was apparently unrelated to internal personnel rules and practices. Indeed, in *Schwaner v. Department of the Air Force*, 898 F.2d 793 (D.C. Cir. 1990), the Court acknowledged that judicial “willingness to sanction a weak relation to ‘rules and practices’ may be greatest when the asserted government interest is relatively weighty.” *Id.* at 796. *See also Dirksen v. U.S. Department of Health and Human Services*, 803 F.2d 1456 (9<sup>th</sup> Cir. 1986) (withholding of claims processing guidelines under Exemption 2 upheld); *Institute for Policy Studies v. Department of the Air Force*, 676 F. Supp. 3 (D.D.C. 1987) (Security Classification Guide withheld because disclosure could reveal vulnerabilities of emergency government communications network).

It is difficult to imagine a weightier government interest than that asserted by IOO in this case. In its determination, IOO states that the information requested, which includes descriptions of the operations and vulnerabilities of the reactor and its containment facility, could be used by terrorists and other potential malefactors to aid in the planning and execution of attacks. Specifically, IOO argues that release of the information would assist terrorists in identifying vulnerabilities and devising ways of overcoming “the protective and mitigative measures in place.” Determination Letter at 3. We have examined the withheld material, which consists primarily of regulation - mandated safety analyses and hazards assessments, and we conclude that they are sufficiently related to “internal personnel rules and practices” to fall within the ambit of Exemption 2. This information is used by DOE personnel in performing their mandated duties to insure the continued safe operation of the ATR. It is predominantly internal in that it does not purport to regulate activities of the public, nor does it set standards to be followed by DOE personnel in deciding whether to proceed against

or to take action directly affecting members of the public. In short, "the unreleased information is not 'secret law,' the primary target of [the FOIA's] disclosure provisions." *Cox*, 601 F.2d at 5.

Moreover, contrary to KYNF's contention, we find that release of the requested material would risk circumvention of laws or regulations. KYNF claims that because the material does not pertain to "the physical security of the ATR and the protections in place to prevent a terrorist attack," Appeal at 5, there is no risk of circumvention. This argument incorrectly presumes that this would be the only information that would be useful to a potential terrorist. Penetrating the physical security surrounding the ATR and overcoming any security countermeasures would likely only be the initial steps in a terrorist attack. A terrorist would then, in all probability, attempt to damage the reactor and its containment facility to cause a release of radioactive material, and to disable any safety systems that would prevent such a release. The withheld information, which sets forth the operational characteristics of the reactor and its containment facility and their potential vulnerabilities, could prove to be very useful to a potential malefactor in achieving these goals. We therefore conclude that release of this information would significantly risk circumvention of the DOE's statutory and regulatory duties to operate the ATR in a safe and secure manner.

In *Environmental Defense Institute*, Case No. TFA-0128 (March 16, 2006), we determined that much of the material involved here was properly withheld under Exemption 2. KYNF has not convinced us that our holding in that case was in error. Therefore, for the reasons set forth above, we find that IOO properly applied Exemption 2 in withholding the information in question.

## **B. Exemption 5**

IOO withheld pages 8 through 18 of document 93 under Exemption 5. This Exemption shields from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The deliberative process privilege is the only privilege at issue here.

The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government formulates decisions and policies. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975); *Coastal States*. The purpose of the deliberative process privilege is to promote high-quality agency decisions by fostering frank and independent discussion among individuals involved in the decision-making process. *Coastal States*, 617 F.2d at 866.

Information within the purview of the deliberative process privilege must be both predecisional and deliberative. Information is predecisional if it is prepared or gathered in order to assist an agency decisionmaker in arriving at a decision. *Renegotiation Board v. Grumman Aircraft Eng. Corp.*,

421 U.S. 168, 184 (1975). Predecisional information is also deliberative if it reflects the give-and-take of the consultative process, *Coastal States*, 617 F.2d at 866, so that disclosure would reveal the mental processes of the decision-maker. *National Wildlife Federation v. United States Forest Service*, 861 F.2d 1114, 1119 (9<sup>th</sup> Cir. 1988).

In general, Exemption 5 may not be used to withhold purely factual material. *Coastal States*, 617 F.2d at 867. However, the courts have recognized two exceptions to this general rule. Factual material may be withheld under Exemption 5 if it is so inextricably intertwined with deliberative matter that disclosure of the factual material would expose or cause harm to the agency's deliberations, *Soucie v. David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) (*Soucie*), or if the author has selected specific facts out of a larger group of facts, and this very act is deliberative in nature. *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 66 (D.C. Cir. 1974).

In its Appeal, KYNF argues that the withheld portions of document 93 are neither predecisional nor deliberative. Instead, the requester contends, document 93 is a final report that is not part of a deliberative process, and therefore cannot be withheld under Exemption 5.

This document, entitled "Causal Analysis Report Essential System Functionality," is the final report of a team from the DOE's Office of Independent Oversight and Performance Assurance (OA), which was assigned the duty of evaluating the functionality of the ATR's safety systems. The purpose of the evaluation was to ensure the continued safe operation of the reactor. To that end, the report included recommendations as to how some of the weaknesses identified during the evaluation could be ameliorated. Consequently, although the document is the final report of the OA team, it is still part of the larger deliberative process concerning the steps that the team believed should be taken to make the ATR safer. The document is predecisional, in that it predated any decision concerning the adoption of the OA team's suggestions, and deliberative, in that it made these recommendations and provided the team's reasons for the recommendations. We therefore conclude that portions of pages 8 through 18 of document 93 were properly withheld under Exemption 5.

However, our review of the withheld material leads us to believe that most of it is purely factual in nature, and is not "inextricably intertwined" with exempt material. *See Soucie*. Moreover, it does not appear that release of this material would compromise the deliberative process of which this document is a part. Consequently, pages 8 through 18 are not exempt from mandatory disclosure under the deliberative process privilege, with the exception of the following, which were properly withheld.

1. On page 11, the last sentence of section B;
2. On page 12, the next-to-last sentence of the second paragraph;
3. On page 13, the last two sentences of section C and the entire last paragraph;
4. All of page 14 except the first, third, fourth, fifth and sixth sentences of section E;

5. On page 15, the fourth through the seventh sentences in the first paragraph, the last sentence of the second paragraph and the second sentence of the final paragraph;
6. On page 16, the third and fourth sentences of the first paragraph, the third and fourth sentences of the second paragraph, the third and fourth sentences of the third paragraph and the last sentence of the fourth paragraph; and
7. All of page 17 except the heading and first sentence of the second paragraph.

We will therefore remand this matter to IOO. On remand, IOO should release pages 8 through 18, with the exceptions set forth above, unless it determines that this material should be withheld under a different FOIA Exemption.

Our finding that portions of this document are exempt from mandatory disclosure under Exemption 5 does not necessarily preclude release of the material to KYNF. The DOE regulations implementing the FOIA provide that "[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest." 10 C.F.R. § 1004.1. In this case, the public interest in release of the material withheld from document 93 is attenuated by the fact that it consists largely of opinions and recommendations that may or may not be adopted by the agency. Furthermore, the release of this predecisional, deliberative material could adversely affect the agency's ability to obtain straightforward and frank recommendations and opinions in the future. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987). We do not believe that discretionary release of the withheld material would be in the public interest.

It Is Therefore Ordered That:

- (1) The Freedom of Information Act Appeal filed by Keep Yellowstone Nuclear Free, Case Number TFA-0156, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.
- (2) This matter is hereby remanded to the Idaho Operations Office. On remand, that Office should release the portions of document 93 described in this Decision unless it determines that the material should be withheld under a different FOIA Exemption .
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay

Director

Office of Hearings and Appeals

Date: July 20, 2006